

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:

Teamsters Local Union No. 639
a/w International Brotherhood of
Teamsters, Chauffeurs,
Warehousemen and Helpers of
America, AFL-CIO,

Petitioner,

and

District of Columbia
Public Schools,

Respondent.

PERB Case No. 90-N-02,
90-N-03 and 90-N-04
Opinion No. 263

DECISION AND ORDER

Pursuant to an Order issued by the Public Employee Relations Board (Board) on September 25, 1990, the above-captioned cases were consolidated for purposes of investigation and decision. All three of these appeals filed by Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Teamsters) arose out of the same negotiations between it and the District of Columbia Public Schools (DCPS) for an initial collective bargaining agreement covering a unit of approximately thirty (30) attendance counselors. The Board's Order requested the parties to submit briefs addressing all issues concerning the twenty-two proposals declared nonnegotiable by DCPS. Briefs were timely filed by both parties on October 25, 1990.

Having concluded our investigation and reviewed the parties' pleadings and supporting briefs, we make the following conclusions with respect to the negotiability of those proposals in dispute.

Preliminarily, we note that D.C. Code Section 1-618.8(b) provides that the right to negotiate over terms and conditions of employment extends to "[a]ll matters...except those that are proscribed by this subchapter, [i.e., the Labor-Management Relations section of the Comprehensive Merit Personnel Act (CMPA)]." The same section of our law lists six specific actions (or sets of actions) that are reserved solely to management, see Subsec. (a). In this situation, as pointed out in our first negotiability opinion, the Board must be careful in assessing

proffered broad interpretations of either subsection (a) or (b), since the former "would vitiate collective bargaining, and would nullify other provisions of the Act" and the latter "would deny [subsection (a)] its clearly intended effect, i.e., to permit management to manage the agencies and direct their employees." (Univ. of the District of Columbia Faculty Ass'n and Univ. of the District of Columbia, 29 DCR 2975, Slip Op. No. 43, PERB Case No. 82-N-01 (1982), Slip Op. at 3.) Notwithstanding the CMPA's expressed reservation of these listed actions in the management's rights provisions under D.C. Code Section 1-618.8(a), a right to negotiate nevertheless exists with respect to matters concerning the exercise of these management actions. We have previously articulated that this negotiation right extends to matters addressing the impact and effect of these management actions on bargaining-unit employees as well as procedures concerning how these rights are exercised. Teamsters, Local Unions No. 639 and 730 a/w Int'l. Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia Public Schools, DCR _____, Slip Op. No. 249, PERB Case No. 89-U-17 (1990); American Fed. of State, County and Municipal Employees, Council 20, AFL-CIO and District of Columbia General Hospital and Office of Labor Relations and Collective Bargaining, 36 DCR 7101, Slip Op. No. 227, PERB Case No. 88-U-29 (1989). Int'l. Assoc. of Firefighters, Local 36 and District of Columbia Fire Dep't, 34 DCR 118, Slip Op. No. 167, PERB Case No. 87-N-01 (1988) and Univ. of the District of Columbia Faculty Assoc. and the Univ. of the District of Columbia, supra.

Turning now to the proposals here in dispute, we shall address each separately.

Proposal No. 1:

ARTICLE V. - SENIORITY

- A. Principle of Seniority - The principle of seniority shall prevail at all times. Everything being equal, seniority shall prevail but fitness and ability shall be considered at all times. Seniority is defined as total length of service with the employer. Discharge or resignation shall constitute a break in service. The last employee hired shall be the first employee laid off, and in rehiring, the last employee laid off shall be the first employee rehired.

For the purpose of application under this Agreement, Seniority shall be maintained on an

occupational unit basis. The occupational unit established for this purpose is as follows:
Attendance Counselors EG-09

The subject matter of seniority has not been expressly removed from the (CMPA)'s presumption in favor of negotiability by the reserved management's rights set forth in D.C. Code Section 1-618.8(a). Moreover, the very D.C. Code Section on which DCPS relies in objecting to this proposal (Sec. 1-625.2) provides in its subsection (d) that "Policies and procedures developed under the authority of this subchapter are appropriate matters for collective bargaining with labor organizations..." (emphasis added). DCPS objects to the language of the proposal's first sentence and that of the sentence referring to order of lay-off and rehiring as making seniority the sole criterion for action and thus running headlong into the reduction-in-force specifications of D.C. Code Section 1-625.2(a)(1). We need not, however, determine the negotiability of those sentences as initially proposed since the Teamsters in its brief (p.6) supplemented its proposal with a clause stating that the proposal "shall not be interpreted or applied in any way inconsistent with federal law and/or D.C. law." With this additional language, and noting also that the second sentence of the proposal modifies the absolute statement of the first sentence as initially proposed, we find that the proposal adequately takes account of the specifications in Section 1-625.2(a)(1), and is negotiable.

Proposal No. 2:

ARTICLE VII. - SENIORITY FOR STEWARDS

Notwithstanding his position on the seniority list, a Steward, in the event of a layoff of any type, shall continue to work as long as there is a job in his unit which he can perform and shall be recalled to work in the event of a layoff on the first open job in his unit which he can perform. If an alternate is serving in place of the regular Steward, he shall be the last person laid off until the Steward returns. Upon return of the Steward, the alternate will be laid off.

As we have ruled above, seniority is a negotiable matter limited only by specific requirements of D.C. law with which a particular proposal would conflict. DCPS asserts that this proposal giving super seniority to stewards for lay-offs and return to work violates the specification in D.C. Code Section 1-625.2 (a)(1) of factors to be considered in the event of reductions in force, factors that do not include status as a

union steward. Again, we do not find it necessary to rule on that argument since we find this superseniority proposal nonnegotiable under the proviso to Section 1-625.2's subsection (d), which is set forth in footnote 1.^{1/} A bargaining agreement containing the proposed provision would provide unit members other than the steward(s) "benefits or procedures of less employee protection than those contained in this subchapter" were such unit member(s) displaced for protection from layoff or displaced for recall to which the unit member was otherwise entitled by a steward entitled to the protection of this proposal.

Proposal No. 3:

ARTICLE XXII. - NO STRIKES AND NO LOCKOUTS

During the life of this Agreement, the Union shall not cause or engage in, support, encourage or authorize any employee covered by this Agreement to participate in any cessation of work through slowdowns, strikes, work stoppages, or otherwise, nor will the Board engage in any lockouts against any employee covered by this Agreement.

This provision claims no right barred by statute but only disavows any union right to engage in conduct that is prohibited by law. DCPS contends that the initial phrase, "During the life of this Agreement" is intended to establish a right to strike after the Agreement's expiration. The argument is without merit as a matter of contractual interpretation (the proposal says nothing at all about any period other than that covered by the Agreement) and there is no question but that the D.C. Code strike prohibition prevails at all times. The proposal is negotiable.

^{1/} D.C. Code Section 1-625.2(d) provides:

(d) Policies and procedures developed under the authority of this subchapter are appropriate matters for collective bargaining with labor organizations: Provided, however, that no such bargaining agreement may provide benefits or procedures of less employee protection than those contained in this subchapter.

Proposal No. 4:

ARTICLE XXIII. - PROTECTION OF RIGHTS

It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a primary labor dispute, or refuses to go through or work behind any primary picket line, including the primary picket line of Unions party to this Agreement.

Teamsters asserts that, notwithstanding the CMPA's prohibition of strikes by District employees, "it does not follow that one of the Public Schools' employees, in the course of its duties, must be forced to cross a primary picket line established by non-unit employees." Furthermore, DCPS "has considerable freedom to negotiate grounds for disciplining its employees." DCPS counters that the proposal contravenes the CMPA's prohibition of strikes under D.C. Code Section 1-618.4 and plainly infringes upon management's right to discipline employees for cause under D.C. Code Section 1-618.8(a)(2).

The unqualified prohibition of any discipline in any situation where a unit employee refuses to enter the site of any primary labor dispute or to work behind any primary picket line infringes upon the management right "to take disciplinary action against employees for cause" that is protected by D.C. Code Section 1-618.8(a)(2). We therefore find this proposal nonnegotiable. This is not, however, to be taken as a ruling by the Board that every picket line clause, no matter how tailored, is nonnegotiable.

Proposal No. 5:

ARTICLE XXV. - SAFETY AND HEALTH

Section 2 - Employees Working Alone

Employees shall not be required to work alone in areas beyond the call, observation or periodic check of others where dangerous chemicals, explosives, toxic gases, radiation, laser light, high voltage or rotary machinery are to be handled, or in known dangerous situation when ever the health and safety of an employee would be endangered by working alone.

DCPS contends that the proposal violates management's rights under D.C. Code Section 1-618.8(a)(5) by restricting its rights "to determine...the number of employees...assigned to an organizational unit, work project or tour of duty...." Teamsters argue that the proposal does not mean that two employees must work side-by-side on a job that management determines requires one person. Rather, says the Teamsters, this provision says only that at least one other person must be near enough to obtain any needed help for an employee assigned to work on a job under certain hazardous conditions. We do not believe that the proposal can be read as dictating, or otherwise limiting management's freedom to determine, the number of employees to be assigned to "an organizational unit, work project or tour of duty." The proposal does not speak to employee assignment (indeed, the person in a position to summon aid need not even be an employee). In terms, the proposal simply requires that in certain specified dangerous situations, someone must be within call, or able to observe or check periodically. The proposal is negotiable.

Proposal No. 6:

ARTICLE XXVII. - LOSS OR DAMAGE

Employees shall not be charged for loss or damage unless clear proof of gross negligence is shown. This Article is not to be construed as permitting charges for loss or damage to equipment under any circumstances. No deduction of any kind shall be made without a hearing with the Local Union.

- A. Employees shall report any loss, damage, or destruction of property to the supervisor immediately upon becoming aware of such loss, damage or destruction.

Teamsters argue that since D.C. Code Section 1-617.1 concerning "causes" for taking enumerated adverse actions does not address charging "employees with loss or damage to District government property, "it does not preclude the parties from negotiating over it. The Teamsters assert that the proposal "merely sets forth standards to be met when charging the employee for such loss or damage, and affords an employee so charged its due process rights (i.e., a hearing). Finally, [the Teamsters assert] the provision ensures against charging an employee for loss or damage to equipment under any circumstances (thus limiting charges to the employee under appropriate circumstances)." The Teamsters note that its proposal is not

contrary to the provisions of D.C. Code Section 1-1216 ²/ but "merely adds the requirement that before charging the employee for damages to District property, that clear proof of gross negligence be established."

DCPS contends that the proposal restricts its statutory authority under D.C. Code Section 1-1215(c) to impose "appropriate disciplinary action...against any employee for a negligent act or omission." Furthermore, the proposal contravenes the employee liability standard for damage to District property statutorily established under D.C. Code Section 1-1216 from "negligent" to "gross negligence."

At the outset, D.C. Code Section 1-617.1 entitled "Adverse actions" and D.C. Code Section 1-1215(c) addressing disciplinary action by the District of Columbia has no relevance to the determination of the negotiability of a proposal concerning employee responsibility for the cost or expense resulting from loss or damage to District property. We therefore reject the parties' discussions with respect to the applicability of these statutory provisions. However, we find that the proposal directly encoaches upon the employee liability standard set forth in D.C. Code Section 1-1216.

Section 1-1216's express statutory standard, i.e., "negligence," is directly undermined by the proposal's second sentence which provides a "gross negligence" standard. This would alter the statutorily established circumstances, i.e., "negligent damage to or loss of District property," under which the District may charge employees by placing a heavier burden on it, vis-a-vis, the "gross negligence" standard. To this extent the proposal directly contravenes D.C. Code Section 1-1216 and is therefore, nonnegotiable.

²/ D.C. Code Section 1-1216 provides:

Liability of employee to District for negligent damage to its property.

Nothing in Sections 1-1211 to 1-1216 shall be construed so as to relieve any District employee from liability to the District for negligent damage to or loss of District property. (July 14, 1960, 74 Stat. 520, Pub. L. 86-654, Section; 1973 Ed.,)

We further note, with respect to our dissenting members, that the preface in Section 1-1216, "Nothing in Sections 1-1211 to 1-1216 shall be construed so as to relieve any District employee from liability to the District," affords no greater latitude to the negotiability of this proposal. In this regard, we agree with the dissenting opinion that this clause merely provides a statutory interpretation that Sections 1-1211 to 1216 do not relieve "District employees from liability to the District." We disagree however, that this lack of relief from liability under D.C. Code Sections 1-1211-1216 leaves open to negotiation the statutorily established standard for employee liability in Section 1-1216. We note that Section 1-1216 itself is among the D.C. Code Sections that is not to be construed as relieving liability for such negligent damage or loss. To interpret Section 1-1216 differently would render the second half of this statute, i.e., "for negligent damage to or loss of District property," meaningless.

Members Kohn and Danowitz dissent from this ruling in an opinion that is attached hereto.

Proposal No. 7

ARTICLE XXVII. - INCLEMENT WEATHER WORK

Section 2 - Reporting Time

During inclement weather where the District Government has declared an emergency, employees (other than those designated essential employees) will be given a reasonable amount of time to report for duty without charge to leave. Those employees required to remain on their post until relieved will be compensated at the appropriate overtime rate or will be given compensatory leave for the time it takes his/her relief to report for duty.

The Employer agrees to dismiss all non-essential employees when early dismissal is authorized by higher officials during inclement weather.

The Teamsters revised this proposal in its brief by substituting "Superintendent of Schools" for "District Government" in the first line. DCPS has contended that to the extent the proposal in its original form usurped the Board of Education's independent personnel authority as an independent agency under D.C. Code Section 1-603.1(13), it is nonnegotiable. Furthermore, DCPS makes the general assertion that the proposal

violates its rights under D.C. Code Section 1-618.8(a)(6) "[t]o take whatever actions may be necessary to carry out the mission of the District government in emergency situations."

Any basis for DCPS' objection with respect to infringement upon its personnel authority has been eliminated by the revision. As for its second objection, we find nothing in the proposal that contravenes management's authority in emergency situations. The proposal only addresses employee accommodations under inclement weather conditions. As such, the proposal is clearly negotiable.

Proposal No. 8

ARTICLE XXX. - PROMOTION PROCEDURES

- A. All attendance counselors are entitled to have knowledge of promotion policies and procedures. A copy of promotion policies shall be maintained in the business office in each school and shall be available for use by attendance counselors.
- B. All vacancies in higher positions to be filled competitively shall be advertised throughout the school system by announcements which will set forth the grade level, application procedures and the deadline date for submission of application. Additional information concerning positions may be secured from the Division of Human Resources Management.
- C. Announcements shall be posted in a conspicuous place on the business office bulletin board in each school or office by the responsible officer in charge. Copies shall be sent to the Union.
- D. Every attendance counselor applicants [sic] for a higher position who is not selected will be so advised in writing within 20 school days after the position has been filled. Such applicants shall have the right to go through the grievance procedure.

This proposal would provide bargaining-unit employees information on vacancies that would represent promotional opportunities. It also provides the Teamsters copies of this information. DCPS's only contention is that the proposal would provide information on positions outside the bargaining unit, which the Teamsters do not represent. DCPS asserts that the promotion procedures therefore "do not vitally concern" bargaining-unit employees' terms and conditions and so the proposal is nonnegotiable.

Nothing in the CMPA proscribes the negotiability of the provisions of this proposal. The information is sought for use by bargaining-unit employees and is plainly germane to the terms

and conditions of their employment. We find DCPS's objection to this proposal to be frivolous and the proposal negotiable.

Proposal No. 9:

ARTICLE XXXI. - TEMPORARY APPOINTMENTS, TRANSFERS AND DETAILS

B. Transfers

Paragraph 1.

Employees displaced by the elimination of jobs through job consolidation (combining the duties of two or more jobs), the installation of new equipment or machinery, the curtailment or replacement of existing facilities, the development of new facilities, or for any other reason, shall be permitted to exercise their seniority rights to transfer to any other vacancy for which they are qualified. An employee transferred as a result of the application of this provision may be given reasonable training needed to assume the duties of the job in which he is transferred.

Paragraph 2.

Employees desiring to transfer to other positions shall submit an application in writing to their immediate supervisor for transmittal through supervisory channels with a copy to the division director. The application shall state the reason for the requested transfer. Employees requesting transfers for reasons other than the elimination of jobs shall be transferred to vacancies for which they qualify on the basis of seniority; provided that such transfer shall not adversely affect the operation of the work site from which the employee is leaving. The school system shall respond to the employee's transfer request within twenty (20) work days.

Paragraph 3.

If a transfer is granted in response to an employee's request, such employee shall be

ineligible to request another transfer within
a one-year period.

Paragraph 4.

Involuntary transfers or details shall be
based on operational requirements and shall
be in the inverse order of seniority, except
in emergencies and in cases where it would
create a hardship on the employee and/or the
operations at the work site.

DCPS contends that the proposal interferes with management's
sole right to transfer an employee under D.C. Code Section 1-
618.8(a)(2) and is thereby nonnegotiable. The Teamsters assert
that the proposal merely provides procedures for transferring
employees and addresses the impact and effect of management
decisions on transferred employees, while leaving in management
the ultimate decision to transfer employees.

As to Paragraphs 1, 2 and 3, we agree with the Teamsters'
assessment. There is nothing in these paragraphs that violates
management's sole right to decide on a transfer. The proposal is
limited to transfer procedures and accommodations for those
employees transferred.

In reviewing Paragraph 1, we note that the circumstance
addressed does not constitute a "transfer" within the meaning of
Section 1-618.8(a)(2) but rather describes the use of seniority
by an employee whose job is eliminated, so that the employee no
longer has a position, which is commonly known as "bumping." The
proposal addresses procedures that such employees may exercise
for placement in vacant positions for which they are qualified.
See discussion of issues number 1 and 2 in University of the
District of Columbia Faculty Association and University of the
District of Columbia, supra, Slip Op. No. 45₂ at 3-5. However,
Paragraph 4 places absolute limitations on management's sole
right to transfer that are incompatible with D.C. Code Section 1-
618.8(a)(2).

Therefore we find Paragraphs 1, 2, and 3 to be negotiable
and Paragraph 4 to be nonnegotiable.

Proposal No. 10:

ARTICLE XXXI. - TEMPORARY APPOINTMENTS, TRANSFERS AND DETAILS

D. Details

Employees detailed to a higher position for more than sixty (60) days shall be paid at the higher rate beginning with the first full pay period after the sixty (60) days detail. Such detail shall not be extended without the mutual consent of the affected employee. All such details shall be put in writing as soon as possible.

Teamsters describe this proposal as ensuring "that a detailed employee (as a result of a management decision to detail) receives comparable pay for his or her work after a specified period of time." DCPS contends, however, that the proposal interferes with management's sole right to assign employees pursuant to D.C. Code Section 1-618.8(a)(2) to the extent that it requires "mutual consent before a detail can be extended" and thus is nonnegotiable.

We agree with both the Teamsters and DCPS. Though this is presented as a single issue, it contains separate provisions that are severable. To the extent that the proposal addresses compensation during a detail, it is clearly negotiable pursuant to the express provisions of D.C. Code Section 1-618.17 concerning collective bargaining over compensation.

However, we find the extension of details to be a form of assignment. The requirement of the second sentence of the proposal that an employee must consent before management may extend a detail after the first 60 days thus infringes on management's sole right to assign employees under Section 1-618.8(a)(2). Such a provision cannot be seen as procedural or an accommodation as we find the last sentence in the proposal to be. We therefore find the proposals in the first and third sentences here negotiable and that the proposal in the second sentence nonnegotiable.

Proposal No. 11:

ARTICLE XXXI. - TEMPORARY APPOINTMENTS, TRANSFERS AND DETAILS

E. Reduction in Force

Paragraph 1.

In the event of a layoff (reduction in force), employees shall laid off (sic) in the inverse order of seniority and in accordance